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IN THE

Supreme Court of the United States

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

WHITE RIVER LUMBER COMPANY ..... *Appellant,*

v. No. 101.

STATE OF ARKANSAS, EX REL., H. W. APPLEGATE AS ATTORNEY GENERAL ..... *Appellee.*

APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF OF APPELLEE

STATEMENT

This suit was filed by the State of Arkansas on the relation of the Attorney General to recover back taxes on lands of appellant under the provisions of the statutes of the State. Recovery is sought for the State itself, and also for the counties and school districts in which the lands in question are located.

In the original complaint judgment was asked on appellant's capital stock under Section 9965 of Crawford & Moses' Digest of the Statutes of Arkansas, inasmuch as appellant had never filed with the county assessor for any of the years in question an intangible property report and had never paid taxes on its capital stock. Soon after the suit was filed, the Arkansas Supreme Court, in the case of *State of Arkansas* v. *Lion Oil & Refining Company,* 171 Ark. 209, held the capital stock of foreign corporations not to be taxable, owing to the fact that such stock has no

situs in this State, and that any attempt to tax it would be in violation of the Federal Constitution.

Appellee then filed an amendment to its complaint to recover taxes on timber lands of appellant in Arkansas, Phillips, Monroe and Desha counties. Practically all of the lands lie in a body and extend up and down White River, the river being the boundary line between the counties. The lands, by reason of the quantity and quality of timber upon them, naturally fall into two classes, one group being designated throughout the suit as the "Big Island lands," embracing 7,964 acres, and the remainder of the lands, embracing approximately 37,000 acres, constituting the other group. The former is the more valuable. It has been the State's contention that the "Big Island" group of lands possesses a value in excess of $65.00 an acre, and the other group a value in excess of $30 an acre, which value said lands have possessed throughout the period covered by this suit. The lands are specifically described in an exhibit to the amended complaint.

Practically all of appellant's lands have been assessed for each of the years 1915 to 1926, inclusive, at approximately $4.00 per acre. The actual assessments for each of the years are set out in a stipulation filed by counsel (R. 231).

It is contended by the State that all of the lands have been grossly underassessed throughout said period, and at a figure far below the average assessment of property generally throughout the State, and also far below the average assessment of other similar property in the county in question. The trial court rendered a decree against all of said lands for overdue taxes by reason of underassessment, but declined to sustain the legal rate of taxation provided for by the Statutes of Arkansas, which is 50% of the true value of property. The chancellor found the average percentage of assessment of other property throughout Arkansas County to be 30%, and ordered appellant's lands likewise to be assessed at 30% of their value.

On appeal to the Supreme Court of Arkansas that court declined to render judgment against appellant on the group of lands comprising approximately 37,000 acres, because of the fact that the testimony was too indefinite and uncertain. As to the "Big Island" group, comprising 7,964 acres, however, the court rendered judgment against appellant. The chancellor had found the "Big Island" group of lands to

have possessed a value of $50.00 an acre throughout the period covered, but the Supreme Court reduced this figure to $40.00 an acre, and sustained the chancellor's finding of the average assessment of other property in the county to be 30 per cent. The Supreme Court likewise ordered appellant's lands to be assessed at 30 per cent of the value found.

It was earnestly insisted by appellant that the back tax law of the State of Arkansas (Sections 10204 *et seq.* of Crawford & Moses' Digest of the Statutes of Arkansas) is unconstitutional as being in violation of the uniformity clause of the State Constitution and the due process and equal protection clauses of the Federal Constitution. The State Supreme Court sustained the constitutionality of the law, and from its judgment the White River Lumber Company has prosecuted this appeal.

ARGUMENT

I. SUMMARY

The State, to prove the value of the timber lands, introduced two witnesses, S. B. Dennison and C. H. Kirkpatrick. The latter was not familiar with the value of timber or logs during the years in question, but had been over all these lands two or three times a year for the last 15 years and was very familiar with the amount and quality of the timber. He had been assisting in the cruising of timber in that vicinity and knew how to estimate the quantity of timber on land.

The witness S. B. Dennison, an expert timber man, who had for 9 years been in the timber business in that vicinity, testified both as to the value of the timber on the land, and also the kind, quality, and quantity of said timber. He had purchased in the same county, either for himself or other timber men, several large tracts of timber, one of the purchases involving a consideration of approximately $250,000.00 (R. 43). His testimony is substantiated by certified copies of three warranty deeds covering these purchases. As to the Big Island group of lands, his testimony is very explicit and in great detail.

Some of the facts sought to be proved by the State are admitted by the appellant's witness, W. W. Keaton, such as the cost of logging the timber. The value of logs for the years 1919 to 1925 is conclusively shown by the prices which appellant received from the sale of logs from other lands it had owned in the same county from 1919 to 1925. The net value of the standing timber was found by taking the value of the timber per thousand feet, and deducting therefrom the cost of logging the timber. The State made no attempt to place any value on the land itself after removal of the timber, as it is overflow land. These figures were merely submitted to the court as an assistance in arriving at the actual value of the timber lands. There were no sales of similar lands in the county, the Big Island group being exceptionally well timbered. It was testified that they were the best timber lands in that entire country.

Appellant, to prove that assessments generally in the county were below the legal percentage of value, introduced two former tax assessors of Arkansas County, who testified they had been ordered by the Arkansas Tax Commission

to assess property in the county at 50 per cent of its actual value. They testified they attempted to assess on this basis, and when they actually knew the value of property it was assessed at 50 per cent. However, they admitted the average assessment throughout the county would not be 50 per cent, but probably 33 1/3 per cent of the value of the property. Appellant also introduced a list of 318 transfers of real estate in the county, showing the considerations recited in the respective deeds and the amount at which each piece of property had been assessed for taxation. According to our figures, the average assessment of the properties covered in this list of 318 transfers is approximately 22 per cent of the value of the properties, taking the considerations recited in the deeds as the actual values.

Appellee, to rebut the above testimony, and to sustain the 50 per cent basis of assessment prescribed by law, introduced the present tax assessor (who had served for the last four years) and a member of the township board of assessors (who had served since about 1917), who testified substantially the same as appellant's witnesses as to the basis of assessment and the actual average. Appellee also introduced a list of 240 transfers similar to that of appellant. The average assessment, we find, of the properties in this list is approximately 56 per cent of the value. The trial court and the State Supreme Court both found the average assessment in the county to have been 30 per cent during the period in question.

Stipulations were signed by the parties as to the tax rates applicable, the actual assessments of each tract of land involved and other undisputed facts of minor importance.

The specification of errors will be found on page 11 of appellant's brief.

The Arkansas statute authorizing this suit is copied in appellant's brief at page 45.

II.

THE BACK TAX ACT OF ARKANSAS DOES NOT VIOLATE EITHER THE EQUAL PROTECTION CLAUSE OR THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION.

It is stated by appellant that the Back Tax Act of Arkansas, in providing for the reassessment of lands of appellant by judicial proceedings, is in violation of the due process and equal protection clauses of the Constitution of the United States, because it provides for a reassessment of the property of corporations, and not that of individuals. It would seem that the decision of this Honorable Court upon that question in the case of *Fort Smith Lumber Company* v. *Arkansas*, 251 U. S. 532, should be conclusive. In that case the statute now involved was expressly held to be constitutional. Further reference will be made to this case later.

In the State court it was appellee's contention that the property in question should be assessed at the legal rate, or 50 per cent of its actual value. Section 9790 of Crawford & Moses' Digest of the Statutes of Arkansas reads as follows, eliminating the parts not applicable:

> "The Arkansas Tax Commission shall file with the county clerk and the assessor of each county a certificate showing the per centum of market value that it has used, or will use, in valuing for taxation for that year the property it is required to value, and it shall be the duty of tax assessor (and the members of the board of equalization) in each county not to assess or reduce the value of any item of property for the purpose of taxation in that year below the per centum of market value so certified by the Tax Commission." • • •

It is shown in evidence by the testimony of the assessors and also by stipulation of counsel (R. 229) that 50 per cent was the basis of assessment certified by the Tax Commission throughout the State of Arkansas for the period in question.

The statute further makes it unlawful for any assessment to be reduced below the percentage actually certified by the Tax Commission. This court has repeatedly held that no taxpayer can escape payment of taxes at the legal rate merely by reason of other underassessments. There

must be a systematic and intentional underassessment of other property.

In the case of *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, it was held:

> "A taxpayer whose property was assessed at its full valuation as required by the State Constitution and laws, though other property of the same class was *intentionally and systematically* assessed by the State officials at less than its full value, can have its assessment reduced to the same proportion of its value that other similar property is assessed. • • •
>
> "Mere errors of judgment in the assessment of other property do not support a claim of discrimination entitling a taxpayer to a reduction of his assessment below the actual value of his property, but there must be something more, something which, in effect, amounts to an intentional violation of the principle of practical uniformity."

The same rule was laid down in the case of *Southern Railway Company* v. *Watts*, 260 U. S. 519. Practically all of the authorities directly in point may be found in the recent note in 3 A. L. R. at page 1370, together with supplemental notes on the same question in 28 A. L. R. page 983, and 55 A. L. R. page 503.

In view of the testimony in the case it seemed to us there was no showing of any system or intention to assess other property below the legal rate of 50 per cent. That the average assessment in the county in question fell somewhat below the legal requirement was entirely natural as it is hardly to be expected that the average will in any State come entirely up to the legal requirements. Three tax assessors and a member of the township board of assessment who served during the period in question testified practically to the same effect, that is, that they were instructed by the Tax Commission to assess property at 50 per cent of its value, and that they attempted to do so. They admitted the average assessment in the county would not come up to this figure, but would probably be about 33 per cent of the value of the property in the county.

It will be borne in mind that there is not one word of testimony in the record of a State-wide nature. Although there are 75 counties in the State of Arkansas, all of the

testimony which appellant has introduced is applicable to only one county.

The only other testimony relating to the question of uniformity consists of a list of 558 transfers of real estate (hereinabove mentioned), all of which are confined to one county (R. 162-225).

We believe that these transfers alone show that there has not been a system or intention to assess property in the county in question below the legal rate of 50 per cent. If there are 240 pieces of property in one county assessed at an average above the legal rate, as is the case here, that, in itself, will almost preclude any idea of a rule or system of assessing property below the legal 50 per cent rate. It is, of course, not to be assumed that there are only 240 pieces of property in that county which are assessed at the legal percentage, but there are, in fact, 240 out of the 558 pieces of property mentioned assessed at an average equaling the legal percentage.

The Supreme Court of Arkansas concluded, however, that there had been a systematic and intentional assessment of property in the county at a figure below the legal percentage. It accordingly, following the finding of the chancellor, assessed appellant's lands at 30 per cent of their value to conform to the average assessment in the county.

Appellant now asks further relief because of the fact that there are a few (and there are only a few) other owners of virgin timber lands in the county in question whose lands are also grossly underassessed. Appellant states its lands are no more valuable than these other virgin timber lands mentioned, and that it is a denial of the equal protection clause of the Federal Constitution to raise appellant's taxes when a few tracts of the other virgin timber lands are owned by natural persons and cannot be taxed accordingly.

It is to be remembered, as is disclosed by the testimony copied in appellant's brief, that the vast majority of the timber lands in Arkansas County is cutover and of practically no value. Those lands are owned almost entirely by natural persons and in small parcels. The valuable virgin timber lands are owned almost entirely by a dozen taxpayers, mostly timber companies (corporations). It is true there are two or three natural persons in the county

who own timber lands of considerable value, but the balance of the valuable lands are owned by corporations.

We are concerned now only with the lands designated as the "Big Island" group, inasmuch as the State Supreme Court rendered judgment only on those lands. The "Big Island" group lie on an island formed by White River and a chute and lie very favorably for river transportation, the width of the island being about two miles. The island consists of only approximately 9,000 acres, of which appellant owns more than 7,000 acres.

In many parts of their brief counsel for appellant have quoted testimony of the State's witnesses to show the lands of appellant are of about the same character as the other timber lands of the county. In quoting this testimony counsel have omitted that part of the testimony of the witness S. B. Dennison which expressly states his comparisons relate to the lands of the company other than the "Big Island" group, and that he considers the "Big Island" group far better than any other lands in the county.

The witness Dennison testified on this point as follows:

"Q. How does the land of the White River Lumber Company on Big Island compare with that (the Porter tract)?

"A. Big Island's better. It's the best tract in that whole country. (R. 136) • • •

"Q. How does it (The Wylie-Bush tract) compare to the tract on Big Island?

"A. I think Big Island is one of the best in either county.

"Q. Is it more valuable or not than the Wylie tract?

"A. I think it is more valuable. It's easy to log. You have got the river on one side and the chute on the other, and you can haul it for less money.

"Q. What was paid by S. M. Bush?

"A. Forty-five dollars an acre.

"Q. You stated you handled that deal?

"A. Yes sir" (R. 138).

The witness Dennison also testified, after making comparison of the White River Lumber Company's lands to other timber lands in the county, as follows:

"Q. Now that comparison doesn't refer to the Big Island tract?

"A. No sir. Big Island is an especially fine body of timber; best that has ever been known" (R. 41).

The witness further testified as to the value of the Big Island group:

"Q. What is that land worth?

"A. Well, that land's worty sixty-five dollars an acre. I would be glad to buy it at sixty-five.

"Q. Is there any other of this land that is worth that much?

"A. Yes, they got some just west of Big Island Chute, on the chute in Arkansas County—I say now five hundred acres, I don't remember—don't know just exactly how many acres are there, but around five or six hundred, as good—

"Q. Just as good as the Big Island land?

"A. Yes sir.

"Q. Did you say you would be willing to pay sixty-five dollars an acre for the seventy-two hundred-acre tract?

"A. Yes sir.

"Q. And the five hundred acres?

"A. Yes—they have cut some on there. Yes sir, taking out what they have cut over, I could handle that at sixty-five dollars an acre.

"Q. Would you make that offer?

"A. Yes sir.

"Q. Now, at sixty-five dollars an acre?

"A. Yes sir.

"Q. For the seventy-two hundred acres and the five hundred acres?

"A. Less what they have cut; they have cut some this year on that land.

"Q. Less what they have cut in the last two or three months?

"A. Yes sir.

"Q. You would make that proposition, would you?

"A. Yes sir.

"Q. What do you base your estimate of values on, Mr. Dennison?

"A. Well, they have got—on that land they have got about fifty-five hundred feet of commercially good timber per acre on there.

"Q. It will average that?

"A. Yes, the seventy-two hundred acres, I think will.

"Q. The seventy-two hundred and the five hundred acres?

"A. The five hundred acres something like that" (R. 31-32).

Dennison further testified that he actually made a bona fide offer of $65 an acre for this land to the White River Lumber Company, which was refused (R. 138-139). The proposed purchase was made on behalf of the Wood Lumber Company of Memphis, and was to be financed through the Liberty Savings Bank of that city (R. 143).

The value of logs in the immediate vicinity of these lands has been throughout the period in question $20 per thousand feet. This was testified to by the witness Dennison (R. 42) and was practically admitted by appellant's witness Keaton (R. 87-8). We believe the best evidence of these values will be found in appellant's answers to appellee's interrogatories (R. 21). These answers show the average value of logs from the year 1919 to 1925, inclusive, to have been approximately $20.00 per thousand feet. Dennison and Kirkpatrick testified that the cost of cutting and delivering these logs was approximately $6.00 a thousand feet during this period. Appellant's witness Keaton admitted the cost to have been from $5.00 to $8.00 a thousand feet (R. 89).

It will be seen from the foregoing testimony that the net value of these logs after deducting the cost of logging from the price received for the logs was $14.00 a thousand

feet. It can be immediately seen what these logs actually brought net in the market. These figures should amply sustain the testimony placing the value of $65.00 per acre on the land throughout the period in question.

It is true, as appellant has said, that the witness Kirkpatrick was not familiar with the value of timber, but he was very familiar with the lands in question and the amount of timber on them. He testified in detail as to the timber, both as to quality and quantity. For the values we rely on the other testimony. It is likewise true, as appellant has said, that no lands in the county have sold for more than $25.00 per acre, except one tract which sold for $45.00 per acre. This merely substantiates our contention that appellant's lands are more valuable than the other lands in the county.

Appellant states that the value placed by the witness Dennison on these lands was expressly made to apply only to the good lands and that he would pay $65.00 an acre for such lands only as had not been cut over. It will be seen from the above quoted testimony that what the witness actually did testify is that he would want to deduct only such as had been cut *in the last two or three months*. This is for the reason that the witness was basing his estimates of value on the amount of timber on the land two or three months ago. However, inasmuch as this testimony was taken more than three months after the period in controversy in this suit, the timber cut within that time should not be deducted from the value as testified by Dennison.

We have quoted extracts from Dennison's testimony merely because appellant has endeavored to show its lands to be of the same character as the other timber lands in the county.

In arguing the injustice of requiring corporations to pay back taxes when individuals cannot be sued, counsel mention the fact that one Storthz owns a large amount of lands in the county in question, and appellant's witness Keaton testified those lands are of about the same value as the lands of appellant. This testimony is definitely rebutted by the witness Dennison. He was asked to compare the Storthz land, which had recently been sold to the Thane Lumber Company for $13.00 an acre, to the Big Island lands.

"Q. How would that land compare in proportion to the Big Island tract?

"A. I don't think that down there is worth anything like a fourth—at the time it sold" (R. 137).

Assuming the lands sold by Storthz to have been of the value they sold for ($13.00), and assuming the Big Island tract to be worth exactly four times as much (Dennison says they were worth more than that), this would give a value of $52.00 an acre to the Big Island tract. Unquestionably there are some natural persons in the county, whose property is underassessed, but there is no testimony of any nature to show that any individual in the county owns lands nearly so valuable as the Big Island group belonging to appellant. It is true the White River Lumber Company owns many other lands in the county which are not so valuable as those on Big Island, but it is only the latter with which we are now concerned.

On page 4 of appellant's brief it is said the list of lands contains 191 separate descriptions located in 105 different sections in four counties, and that the list was never submitted to any witness, and no mention was ever made in the testimony of any particular tract of land by description. This statement is misleading. The present appeal has no reference whatever to any lands, except those in one body and located on Big Island, embracing approximately 8,000 acres, and in only one county. The Supreme Court of Arkansas declined to consider any of the balance of the lands.

The witnesses plainly stated which of the lands they were familiar with. Dennison testified that all of the lands lie in one township and run north and south, giving the numbers of the townships explicitly (R. 34).

We think the map introduced as an exhibit to Keaton's deposition is of absolutely no assistance in determining the value of any of the timber lands. It has been testified, and it is a matter of universal knowledge, that one tract of timber land may be extremely valuable and the adjoining tract be absolutely worthless. This is, of course, due to the fact that the latter tract may never have had timber of any value upon it, the timber may have been of an inferior grade, it may have been stolen, it may have been burned, or it may have been cut by the owner.

Counsel give several specific examples of underassessments of individuals owning large tracts. The cutover lands are almost worthless and are assessed at $4.00 per

acre, the same amount at which the virgin timber lands on Big Island belonging to appellant have been assessed. The former have been assessed at more than 100 per cent of their value and the latter at not to exceed 10 per cent. We are not asking that the appellant's assessment be raised to the extent of requiring it to pay taxes on the same basis that the owners of cutover timber lands are paying, nor are we asking that they be assessed at the legal rate of 50 per cent. We are merely defending the action of the State Supreme Court in assessing appellant's lands at 30 per cent of their value, the average percentage of assessment in the county, and at a figure slightly above one-half of the legal rate in the State. If appellant is entitled to an assessment of its lands at $4.00 an acre, the present assessment, then other taxpayers in the county are entitled to have their assessments reduced to the same percentage, or to less than 10 per cent of the value of their property. If appellant's lands are assessed at the average rate in the county, it will certainly be no hardship on any one, and no violation of any constitutional provision, either State or Federal.

Counsel contend that the decision of the State court discriminates against appellant because it requires appellant's lands to be assessed at a rate much higher than other similar lands in the county, and, in fact, higher than any other timber lands in the county have ever been assessed. This is, we submit, not an accurate statement. There are no other lands in the county similar to the Big Island group, as we have shown. Furthermore, in considering the average assessment of "other similar lands," we think all lands, or at least all timber lands, should be considered, and not merely the lands containing the better class of timber. It is true the court has raised appellant's assessment above the assessment of any other timber lands per acre, but uniformity, under the State Constitution, must be according to value. Uniformity according to acreage would necessarily be discriminatory. One tract may be worth $100.00 an acre, and the adjoining tract may be practically worthless, as we have seen from the testimony. Clearly, then, there is no uniformity in assessing both tracts at the same amount per acre. Our contention on this point is expressly sustained in the following quotation from Cooley on Taxation:

> "It is self-evident that a property tax of a certain sum imposed on particular property without regard to

value violates the rule as to equality and uniformity where the value of such property varies. To illustrate: *Suppose all farm land should be taxed a dollar an acre. No one would attempt to defend the equality of such a tax as applied to the land of one person worth $100.00 an acre and to the land of another worth $10.00 an acre. The decisions of the courts are all in harmony, in support of this rule.*"

Cooley on Taxation (4th Ed.), Sec. 297.

We have gone into the facts of this case, as disclosed by the testimony, merely to answer counsel's brief. We think the facts in the case will not be reviewed by this court. We are familiar with the rule that the court will sometimes review the facts if closely intermingled with a constitutional question, but it has expressly been held that under circumstances similar to these the facts will not be reviewed.

In the case of *Western Union Telegraph Company* v. *State of Missouri*, 190 U. S. 422, the court said:

> "Plaintiff in error asserts the correctness of the finding of the trial court, and insists that it is the only finding that could have been made, and bases the argument against the taxes assessed on that insistence. But if the finding on the question is one of fact, necessarily we are bound by that made by the Supreme Court of the State."

That case was likewise a tax suit in which there was a discrimination or overvaluation alleged.

See also *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626.

In the case of *Michigan Central Railway Co.* v. *Powers*, 201 U. S. 302, the court said:

> "It is charged in the bill that there was a systematic undervaluation of other property in the State, which resulted in denying to this plaintiff the equal protection of the law. The trial court found against this charge. It is enough to say that generally we accept the finding of a trial court upon a question of fact when the testimony respecting it is conflicting."

The latter case involved the same principle involved in the case at bar. We likewise have a conflict in the testimony in our case, and we submit that under the rule above adopted, there should be no review of the facts after they have been expressly found by the chancellor and by the Arkansas Supreme Court.

Counsel, on page 7 of their brief, give their impression of the testimony of the assessors as to the percentage at which property has been assessed in Arkansas County, stating that all of the assessors said that they endeavored to assess the property of the county on a uniform basis, and did so as far as they knew how. We do not, of course, charge any intentional neglect of duty, but we do contend there was a total ignorance of the facts in regard to appellant's lands. Bearing upon these questions we quote the following short excerpts from the testimony:

J. C. CASH, County Assessor from 1919 to 1923, testified:

"Q. Do you know about what basis of valuation, that is, what percentage of actual value property was assessed at during those years?

"A. I couldn't say the actual value, but not exceeding, I would suppose, thirty to thirty-three and a third valuation. Their valuation, it was supposed to be fifty per cent, but I don't think any of it was assessed above a third" (R. 103).

"Q. Are you familiar with the lands and the timber belonging to the defendant in this case, the White River Lumber Company?

"A. No sir, I am not.

"Q. Have you ever seen it?

"A. Not that I know of" (R. 105).

"Q. If a taxpayer would turn in a piece of property that he said—came and told you that property was worth a hundred thousand dollars, and your office would find out to your own satisfaction that property was worth a hundred thousand dollars, what figure would you put that in at?

"A. Well, we tried to put it in at fifty thousand dollars.

"Q. Fifty thousand. Where you knew the value you put it in at fifty per cent?

"A. Yes sir" (R. 105).

"Q. Now, Mr. Cash, do you know how many thousand feet of timber there are on any of the White River Lumber Company's lands?

"A. No sir, I do not.

"Q. You have no idea of the value?

"A. No sir" (R. 108).

M. F. MONTGOMERY, county assessor from 1915 to 1919, testified:

"Q. What per cent has it been assessed at, Mr. Montgomery?

"A. Well, I—I don't know whether it would average a third or not, Mr. Rose, I am not sure; I never figured it out.

"Q. But you would have assessed it at fifty per cent if you knew—

"A. I would have tried to, yes sir" (R. 115).

A. N. BEST, a member of the township board for Chester Township, in Arkansas County, since about 1917, testified:

"Q. Did you assess the virgin lands of the White River Lumber Company at the same you assessed the cut-over lands in the other parts of the county?

"A. Yes sir; all the same.

"Q. What per cent did you assess property in Arkansas County for those years?

"A. Just about fifty.

"Q. About fifty per cent valuation?

"A. From about thirty to fifty per cent valuation.

"Q. If you had been told or had sufficient evidence that the value of those lands or of any other lands was sixty dollars an acre, for instance, what valuation would you have placed on them?

"A. About fifty per cent; about thirty dollars. If it was worth sixty, put it about thirty.

"Q. Why was it you didn't place any of this land at a higher value than four dollars?

"A. I didn't view it and didn't know where it was.

"Q. You didn't go over it?

"A. No; I didn't see it. I didn't know whose it was" (R. 118).

"Q. Have you an automobile, Mr. Best?

"A. Yes sir.

"Q. What kind?

"A. Ford.

"Q. What did you pay for it?

"A. Why, about five hundred and five dollars.

"Q. How much did you assess that for?

"A. Two hundred and fifty dollars.

"Q. You assessed it on the taxbooks for two hundred and fifty dollars?

"A. Yes sir" (R. 120-121).

F. E. STEPHENSON, county assessor from 1922 to 1926, testified:

"Q. Did you make any inspection of those timber lands?

"A. No sir; never did.

"Q. Have you ever seen any of it?

"A. Well, not that I know of" (R. 124).

"Q. Mr. Stephenson, what is the average assessment for—first I will ask you, has the Railroad Commission sent a certificate here requiring any per cent?

"A. Fifty per cent.

"Q. You have received that each year?

"A. Yes sir.

"Q. And what has been your method in assessing?

"A. Well, I have assessed, and I might think at the time I was assessing I would get about fifty per cent, but sometime later I would find out I was wrong. But where I absolutely knew anything of it I have tried to go on the fifty per cent basis" (R. 125).

"Q. The average assessment over the county, what is the average assessment?

"A. Well, I would think about thirty-three and a third" (R. 126).

"Q. Then you don't actually know what any of this land of the—or, how much timber is on any of this land?

"A. No sir; I wouldn't have any more idea than you would" (R. 127).

"Q. Now, if you had had some convincing evidence produced to show you timber land was worth, say sixty-five dollars an acre, would you have raised that timber land?

"A. Yes sir.

"Q. But you didn't have any such evidence?

"A. No sir.

"Q. You didn't know about what the value was?

"A. No sir; no more than Mr. Keaton told me—I talked to him about it.

"Q. That is the White River Lumber Company man?

"A. Yes sir" (R. 129).

The State Supreme Court has held, however, that if there was a fifty per cent basis of assessment, it was not followed, and has relieved appellant from paying taxes except at the average percentage of assessment in that county, or 30 %. The question now is whether appellant is entitled to a still further reduction of its assessment from 30% to less than 10% of the value of its property.

Appellant concedes that the back tax law of Arkansas has been upheld by this court in the case of *Fort Smith Lumber Company* v. *Arkansas*, 251 U. S. 532, as constitutional, but emphasizes the language of the court in the opinion as a possible avenue of escape for it.

In that case the court said:

> "It is to be presumed *until the contrary appears* (italics ours) that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases."

If the facts of any particular case can justify it to be made an exception to that decision, we submit it clearly should not be done in this instance. Abundant relief has already been granted appellant. We believe the testimony fairly shows the lands in question to possess, and to have possessed throughout the period involved, a value in excess of $65.00 per acre. The chancellor reduced this value to $50.00, and the State Supreme Court again reduced it to $40.00. The State Supreme Court also made appellant's assessment only 30 per cent of the value of the property. On over four-fifths of the lands sued on, no recovery at all was allowed. Under the decision of the State Supreme Court there is nothing required of appellant except to pay taxes at the average rate of taxation. We submit that is all that this Honorable Court has ever required.

In the following cases the average rate has been adopted as proper:

German National Bank v. *Kimball*, 103 U. S. 732.

Michigan Central R. R. Co. v. *Powers*, 201 U. S. 245.

See also *Taylor* v. *L. & N. R. R. Co.*, 88 Fed. 350.

Counsel have quoted at some length from a dissenting opinion of Associate Justice Wood of the Arkansas Supreme Court, in another case, in which he questioned the constitutionality of the back tax law. We desire to quote the following language of the court itself in the case at bar. We have italicized certain parts for emphasis. That part of the opinion relating to the constitutionality of the law reads as follows (after citing the case of *State of Arkansas* v. *Ft. Smith Lumber Co., supra*):

> "In upholding the right of the State to sue for these back taxes, it was stated by Mr. Justice Holmes, speaking for the court, that it was within the power of the State, so far as the Constitution of the United States is concerned, to tax its own corporations in respect of the stock held by them in other domestic

corporations, although unincorporated stockholders are exempt from such tax, and that a discrimination between corporations and individuals in regard to such a tax could not be pronounced arbitrary, although the precise ground of policy which led to the distinction did not appear.

"It was there further said: '*The same is true with regard to confining the recovery of back taxes to those due from corporations. It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the State.* See *New York State* v. *Barker*, 179 U. S. 279, 283.'

"Other decisions by the Supreme Court of the United States have upheld the validity of back tax statutes passed by the States which apply only to corporations, upon the ground that the State Legislatures, in passing such statutes, may have ascertained, as a practical matter, that *if such statutes were made applicable to individuals the expense of enforcement would be so great that the law would be without profit to the State. Winona, etc., Land Co.* v. *Minnesota*, 159 U. S. 526. *Weyerhaueser* v. *Minnesota*, 176 U. S. 550; *Florida, C. & P. R. R. Co.* v. *Reynolds*, 183 U. S. 471.

"We may say, therefore, that the statute under which the State has here proceeded does not violate the Constitution of this State or the Constitution of the United States, and that the State may maintain a suit to recover back taxes under a statute which applies only to corporations, the demand for the additional taxes being predicated upon the proposition that there had been an inadequate or insufficient valuation or assessment of the corporate property" (R. 245-246).

Upon the question of the sufficiency of the testimony, the language of the court is as follows:

"We think, however, that the testimony, except as to the Big Island group, was too indefinite and uncertain to measure up to the requirement announced in the case of *State ex rel.* v. *Kansas City & M. Ry. & Bridge Co., supra*, quoted above. The principal witness for the State—one Dennison—candidly admitted

that he had only a very general knowledge of the company's lands except in Arkansas County, and more especially of the Big Island group.

"We are of the opinion that the testimony does not show as to any of the lands except the Big Island group 'any inadequate of insufficient valuation or assessment of such property, or undervaluation thereof,' within the meaning of the rules of law by which that fact is to be determined.

"*As to the Big Island group, consisting of 7964 acres, the testimony is much more definite and certain. This is shown to be a body of land so unusually well timbered as to have a value not possessed by the other timbered lands* which were assessed at from 4 to 5 dollars per acre. *The assessing officers were in ignorance of the quality and quantity of timber which gave this land its greater value. As to this group of lands there was an ignorance of the facts.* The testimony is conflicting as to its value, but we think it was clearly shown that these lands were of an average value during the entire time covered by the assessments in question of $40.00 per acre, taking into account the timber stolen and the timber sold" (R. 249).

Relating to the question of discrimination and uniformity the opinion is as follows:

"As it appears that all other property was assessed at an average of 30 per cent of its market value, these lands should also be assessed at that per cent, and as 30 per cent of $40 is $12, that figure represents the valuation at which the Big Island group should be assessed, less, of course, valuation on which the taxes have been paid.

"It is earnestly argued on behalf of the State that the valuations for purposes of taxation should be assessed at 50 per cent of the market value, as this was the basis fixed by the State Tax Commission, and that any assessment based on a lower per cent of the market value is an undervaluation within the meaning of the statute under which this suit was brought.

"We think, however, that it must appear, from what we have already said, that if the statute is so construed as to permit this to be done, it would offend

against both the uniform clause of the Constitution of the State, quoted above, and the equal protection clause of the Federal Constitution.

"The argument that any assessment at a less per cent of the market value than that fixed by the State Tax Commission is an underassessment, which may be corrected by a back assessment, is so thoroughly answered by the opinion of the Court of Appeals of the Sixth Circuit in the case of *Taylor* v. *Louisville & N. R. Co.*, 88 Fed. 350, that we quote extensively from it. *The opinion was delivered by Judge Taft, then a member of that court and now the Chief Justice of the Supreme Court of the United States.* The opinion contains an exhaustive review of the decisions of the United States Supreme Court, and is one which has been cited and approved by many courts.

"That case is of special value here, as it arose under the taxing laws of the State of Tennessee, and the provision of the Constitution of that State (Article 2, Section 28, Constitution 1870) is so nearly identical with our own on the same subject as to suggest the idea that our provision was taken from the Constitution of that State.

"Under the statutes of that State railroads and certain other property were assessed biennially by a board consisting of three members, known as the 'State Tax Assessors,' whose assessment was subject to review by another board called the 'Board of Equalization,' composed of the Governor, Secretary of State and State Treasurer.

"This State board assessed the property of the plaintiff railroad and all other property which it was required to assess at its real value, whereas it was shown that all other property not assessed by the State Board of Assessors was habitually and intentionally assessed by other assessing officers at not exceeding 75 per cent of its real or correct value.

"The opinion contains a review of many cases and quoted extensively from the opinion of this court in the case of *Ex Parte Fl. Smith & Van Buren Bridge Co.*, 62 Ark. 461. We copy that portion of the opinion, as it is directly in point:

"'In *Ex Parte Ft. Smith & Van Buren Bridge Co.*, 62 Ark. 461, 36 S. W. 1060, the case arose on an appeal from the refusal of the county board of equalization to reduce the taxation of assessment upon the petitioner's bridge. The assessor had assessed one-half of the bridge in Crawford County at $150,000, and the county board of equalization had reduced this assessment to $125,000. At the trial in the circuit court it appeared that $250,000 was a fair market price for the entire bridge, and that $125,000 therefore was the full value of one-half of the bridge. It further appeared that all the real estate in Crawford County was assessed at 50 per cent of its actual value. The appellate court contended that, under the circumstances, the assessment of one-half the bridge should be reduced accordingly to its request of $75,000. The Constitution of the State was exactly in the words of the Tennessee Constitution, to-wit:

"'That all property subject to taxation shall be taxed according to its value, to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the State, and provided further that no one species of property, upon which taxes shall be levied, shall be taxed higher than another species of property of equal value.'

"The law passed in pursuance of this section of the Constitution required the assessors of the counties in the State to assess the real estate at its true market value in money. The court, in construing this question, said:

"'It may be said that, inasmuch as its property was not assessed above its true value, it had no right to complain. But this is not true. It had the right to demand that no unequal burden be imposed upon it by taxation. The duty to contribute to the support of the State Government by the payment of taxes is imposed upon all persons owning property subject to taxation. The Constitution provides that this burden shall be apportioned among them according to the value of their property, to be ascertained as directed by law. When therefore the property of a few is taxed according to its value, and of all others at one-half its value, then the few are required to contribute double their portion of the burden. This is manifestly a

wrong, and justice demands that it be redressed whenever it can be done conformably to the laws. * * * In this case the county court acquired jurisdiction, by the appeal of the bridge company, to grant relief from the illegal, erroneous, or unequal assessment of appellant's property, but did not acquire the right or authority to make the valuation of all real property in the county for the purposes of taxation, in all cases in which it had not been done, the true value, by raising it, or to change the valuation of any property except the bridge. The assessment of no property can be increased without notice first given to the owner by the board of equalization. How, then, was the county court to afford relief to appellant? The only relief it could have afforded was to reduce the valuation so as to make it conform to the standard adopted in the valuation of the other real property in the county, or the *average valuation* of such property. Why should not this relief be granted? The valuation of property is only a constitutional means adopted for the purpose of making the burdens of government bear upon each taxpayer in proportion to the value of his property. The relief suggested accomplishes that end in this case. By granting it, a constitutional right will be enforced, and by denying it, will be withheld, because the means of defeating itself, by the imposition of unequal burdens. To avoid this result, the relief should be granted.'

"The learned Justice also quoted from the case of *Cummings* v. *Bank*, 101 U. S. 153, as follows:

"'But, whatever may be its cause, when it is recognized as the source of manifest injustice to a large class of property, around which the Constitution of the State has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void, and the injustice produced under it must be remedied, so far as the judicial power can give remedy.'

"The decision of the court, so far as it is applicable here, is reflected by the 9th syllabus, which reads as follows:

"'Under the Tennessee Constitution of 1870 (article 2, section 28), declaring that all property shall be taxed 'according to its value,' to be ascertained

as the Legislature shall direct, 'so that taxes shall be equal and uniform throughout the State,' when it is the uniform practice in the various counties of the State to assess real property at not exceeding 75 per cent of its true value, an assessment upon railroad property at its full value violates the uniformity of taxation which is the main purpose of the constitutional provision, and will be enjoined, although this involves a violation of the letter of the State statute passed pursuant to the Constitution, which requires all property to be assessed at its full value.'

"The petition of the State of Tennessee for a writ of certiorari to review this decision was denied by the Supreme Court of the United States on the authority of *Chicago & N. W. Ry. Co.* v. *Osborne*, 146 U. S. 345; *Forsyth* v. *Hammond*, 166 U. S. 506. See also 172 U. S. 647.

"*The basis of assessment which was actually employed in the case of all other property owners must therefore be applied here*, although it does not conform to the directions of the State Tax Commission. This must be done to preserve uniformity" (R. 249-253).

It is seen from the foregoing opinion of the Arkansas Supreme Court that all principles announced by the Federal Courts have been recognized, and actually applied, the judgment being reduced accordingly.

This court has always recognized the principle that "the judiciary should be very reluctant to interfere with the taxing systems of a State, and should never do so unless that which the State attempts to do is in palpable violation of the constitutional rights of the owners of property."

King v. *Mullins*, 171 U. S. 404.

King v. *Panther Lumber Company*, 171 U. S. 437.

In the case of *Jenning* v. *Coal Ridge Improvement & Coal Company*, 147 U. S. 147, the court said:

"The provision in the 14th Amendment, that no State shall deny to any person the equal protection of the laws, does not prevent a State from adjusting its system of taxation in all proper and reasonable ways, nor compel the States to adopt an iron rule of equal taxation."

The case of *People of the State of New York* v. *Barker*, 179 U. S. 279, is squarely in point. In that case the court said:

> "A corporation is not denied the equal protection of the laws of N. Y. Laws 1857, chap. 456, Sec. 3, which, as construed by the highest court of the State, provides an opportunity, in assessing the property of a corporation, to correct an undervaluation first made by the assessors, *without giving the same opportunity to correct an undervaluation of the property of individuals*, so long as the corporation is not assessed on any property not legally taxable, or taxed beyond the actual value of its property, and there is no proof of any general custom to undervalue the property of individuals."

The same principle was announced in the case of *Keokuk & Hamilton Bridge Company* v. *Salm*, 258 U. S. 121.

We submit that this court has already held that where the taxpayer is given the opportunity of contesting the particular assessment, then there is no taking of property without due process of law. The appellant in this case has been given ample opportunity to disprove the allegations of the State. In fact, the burden of proof was upon the State to establish these values, and the State Supreme Court has made its findings upon the testimony.

In the case of *Cincinnati etc., Railroad Company* v. *Kentucky*, 115 U. S. 321, the court said:

> "Whenever, by the laws of a State or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, and provision is made for confirming or contesting the charge thus imposed in the ordinary courts of justice, the judgment in such proceedings does not deprive the owner of his property without due process of law."

Even though the judgment in this case might involve some individual hardship (which, however, we deny) still we think there is clearly no violation of the due process clause.

In the case of *Kirtland* v. *Hotchkiss*, 100 U. S. 491, the court said:

> "So long as a State, by its laws prescribing the mode and subject of taxation, does not intrench upon

> the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States, this court, as between the State and its citizen, can afford him no relief against State taxation, however unjust, oppressive or onerous."

It is, we submit, of no significance that there may be some other property valued at a lower percentage of its value than the assessment sought to be made against appellant's property.

In the case of *German National Bank* v. *Kimball*, 103 U. S. 732, the court said:

> "Where the case made by the complainant is this: that the shares of the bank are taxed at the same per cent on their assessed value as all other property; that the valuation of these shares on which this rate is apportioned is only about half their actual value; that some other property is valued at less than half of its cash value, and for this reason no tax should be paid on the shares of stock of the complainant, the case should be dismissed."

The Supreme Court of Arkansas, in sustaining the legality of the back tax act, cited the case of *Winona & St. Peter Land Company* v. *Minnesota*, 159 U. S. 526. That suit involved the constitutionality of an act of Minnesota providing for the recovery of back taxes upon personal property, but not as to real estate. It was contended that the act was unconstitutional in discriminating against personal property. In sustaining the law, this court said:

> "*The case is different from that of an ordinary tax law* in which there may be some foundation for the claim that the Legislature is expected to make no discrimination, and would not attempt to provide for the collection of taxes on one kind of property without also making provision for collection of taxes on all other property equally subject to taxation. For this statute rests on the assumption that, generally speaking, all property subject to taxation has been reached, and aims only to provide for those accidents which may happen under any system of taxation, in consequence of which here and there some item of property has escaped its proper burden; and it may well be that the Legislature, in view of the probabilities of changes

in the title or *situs* of personal property, might deem it unwise to attempt to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. At any rate, if it did so it would violate no provision of the Federal Constitution, and whether it did so or not was a matter to be determined finally by the Supreme Court of the State."

The State Supreme Court also cited the case of *Florida Central & Peninsular Railroad Company* v. *Reynolds*, 183 U. S. 471. That suit involved the constitutionality of a statute of Florida providing for the recovery of back taxes against railroad companies only, no provision being made to recover from any other class of taxpayers. In sustaining the law this court said:

"The single question therefore to consider, is whether there is anything in the Federal Constitution which forbids a State to reach backward and collect taxes from certain kinds of property which were not at the time collected through lack of statutory provisions therefor, or in consequence of a misunderstanding as to the law, or from neglect of administrative officials, without also making provision for collecting the taxes for the same years on other property. • • •

"They are obligations of the highest character, for only as they are discharged is the continued existence of government possible. They are not canceled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation, and until payment the State may proceed by all proper means to compel the performance of the obligation. No statutes of limitation run against the State, and it is a matter of discretion with it to determine how far into the past it will reach to compel performance of this obligation. • • •

"Our conclusion is that, so far as the Federal Constitution is concerned, the Legislature of Florida had the power to compel the collection of delinquent taxes from the railroad companies for the years 1879, 1880, and 1881, even though it made no provision for the collection of delinquent taxes for those years on other property."

It will be seen that the Florida statute was held constitutional, notwithstanding the fact that it applied to corporations and not to natural persons. In fact, the statute did not even apply to all corporations, but only to railroad companies.

III.

THE METHOD OF REASSESSMENT ADOPTED BY THE COURT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

Counsel say that the court has selected 34 tracts of land from 191 tracts owned by appellant and reassessed them on the basis of an average value for a twelve-year period and on an average basis of assessment covering that period; and they contend that such a procedure amounts to a denial to appellant of the equal protection of the laws, because the lands of natural persons are assessed according to the value of each separate tract and for each separate year on the actual basis of assessment for that year.

The language of the State Supreme Court on these points is as follows:

> "The testimony is conflicting as to its value, but we think it was clearly shown that these lands were of an average value during the entire time covered by the assessments in question of $40 per acre, taking into account the timber stolen and the timber sold" (R. 249).
>
> "As it appears that all other property was assessed at an average of 30 per cent of its market value, these lands should also be assessed at that per cent, and as 30 per cent of $40 is $12, that figure represents the valuation at which the Big Island group should be assessed, less, of course, valuation on which the taxes have been paid" (R. 249).
>
> "The basis of assessment which was actually employed in the case of all other property owners must therefore be applied here, although it does not conform to the directions of the State Tax Commission. This must be done to preserve uniformity" (R. 253).

From the above language it is difficult to see how appellant can say that the court adopted the average percentage of assessment over the 12-year period as a whole. As a matter of fact, it may have had that in mind, but we think it more likely that what the court actually meant was that the average assessment of all property in the county during each of the twelve years in question was 30 per cent. We do not think it makes any substantial difference, however, on which basis the court placed the assessment. Especially is this true as to the value of the lands, for they were of approximately the same value throughout the 12-year period.

As to the matter of valuation, counsel have quoted Arkansas statutes and decisions relating to the manner of valuing and assessing property for taxation. The majority of these statutes and decisions relate to tax sales for failure to pay taxes assessed, and are governed by the specific statutes relating thereto. We believe that counsel have failed to distinguish between "valuation" and "assessment" of property for taxation. It is unqestionably true, as has been contended, that assessments must be made of each parcel separately. This has expressly been done by the decrees of both the trial court and the State Supreme Court. The "valuation," however, is, we submit, a different proposition. In valuing timber lands it is not only unnecessary, but is positively forbidden, that the taxing authorities value separately each small parcel of a large tract when the entire tract is owned by a single taxpayer. The tract must be taken as a whole. This is done even by the tax assessors. We submit that the assessment of lands for taxation under the laws of Arkansas merely means the placing on the taxbooks of the value of the property as found by the assessor. These figures must be placed against the respective subdivisions separately, and not the entire valuation against the entire tract. This is merely a ministerial act. The valuation of the property is the important thing and it is governed by entirely different principles.

Cooley states the following rule:

> "In valuing timber lands, a division of the lands into zones for the purpose of assessment has been upheld. *In valuing a tract of timber, the value of the tract should be estimated as a unit, by estimating the value of the entire tract of timber in lumber, and then*

deducting therefrom the cost of logging the entire tract" (Citing cases).

Cooley on Taxation, (4th Ed.), Sec. 1151.

The most carefully considered case which we have been able to find, applying this principle, is that of *Crowell & Spencer Lumber Co.* v. *Word*, (La.) 93 So. 678. In that case the court was concerned with the manner of determining the value of a large amount of timber land, just as in our case, and stated the rule as follows:

> "At the threshold of the discussion in this case as to the cash value of the timber in question, it may be well to quote the following citation from Cooley on Taxation (3rd Ed.), page 756: 'In valuing land which is to be assessed as one parcel, *the estimate should be of the whole, and not parts separately and then added together.*' This rule is specially applicable to timbered lands in large tracts and is in harmony with the universal custom of persons buying and selling and dealing in timber in this State of estimating the amount and value of the timber at a flat price per thousand feet according to the amount on the entire tract, and then considering the cost of logging the whole or entire tract as a unit, and not the various subdivisions."

We also call the court's attention to the case of *Clallam Lumber Co.* v. *Clallam County*, 245 Fed. 399, which also states this rule.

The Arkansas Supreme Court has considered this question in connection with the assessment of land for taxation and has laid down the following principle:

> "The board in placing a value upon the timber lands took into consideration the logging conditions and everything else that would tend to affect the value of timber lands. This was right. It was shown that *large tracts of timber lands situated in a body and owned by the same persons were of much greater value than smaller tracts owned by separate persons and which do not lie in a body.* The reason is that the only practical way to log the lands is to build tramroads into the timber, and this can only be successfully done when one person or corporation owns a large body of land. * * * The board is required, in making the

valuation, to have due regard to the relative situation, quality of soil, improvements and natural or artificial advantages. In short, it must consider the advantages or disadvantages of location, the quality of soil, *the quantity and quality of standing timber*, as well as all other elements which enter into and constitute the value of the land. These are the plainly expressed rules and principles upon which our Constitution and statutes contemplate that the valuation shall be made."

Drew County Timber Co. v. *Board of Equalization*, 124 Ark. 763.

It is further contended by appellant that because the State has not specifically mentioned each year separately in the testimony as to values, there is created a discrimination against appellant. The witnesses testified as to the value throughout the period in question, meaning, of course, that the value placed upon the lands was the same in each of said years. They did testify specifically, mentioning the years, as to the value of standing timber and the cost of cutting and logging the same. The answers filed by appellant covering appellee's interrogatories also specifically state the prices received for timber cut from adjacent lands for each of the years 1919 to 1925.

We submit the State Supreme Court's construction of its own statutes and Constitution is always held to be conclusive by this court, except when it will amount to a violation of some provision of the Federal Constitution. There is clearly no such violation in the present decision, and the matter of what the State statutes and Constitution require has been definitely passed upon by the State court and with fairness to appellant.

Counsel say the testimony shows that large quantities of timber have been stolen or sold during recent years and that no attempt is made by appellee to show from which of the lands the timber was taken. We have already covered that point and have shown that no thefts have occurred on the Big Island lands, except possibly a few trees (R. 147), and that the values placed upon that group would apply for the period in question on down to three months prior to the taking of the depositions. The latter date was subsequent to the filing of this suit. It is therefore wholly immaterial how much timber has been stolen or sold from the other tracts, as we are not concerned with that question on this appeal.

It is insisted that there is no testimony of values prior to the year 1920. The witness Dennison testified he had been logging in that same section for nine or ten years, and the witness Kirkpatrick testified that he had been over these lands two or three times a year for the last fifteen years. They testified that the values they placed on the lands or the amount of timber thereon would be the same throughout these respective periods. However, we submit, it is not even necessary that testimony relate to the precise time in question in proving values.

> "An observer who is sufficiently familiar with property to make his inference serviceable, may state his estimate of its value, because of the necessities of the case, this being as a practical matter the only available method of proof in a great many instances. The evidence is most freely received where the facts upon which the estimate is based cannot be placed before the jury or are of a nature beyond ordinary experience, and where more cogent evidence is not available. *The evidence may properly relate to a time prior or subsequent to that involved in the controversy*, provided the court regards the period as not too remote to be relevant, the length of the interval merely affecting the weight of the evidence."

22 C. J. 575;

Johnston v. *Farmers Fire Insurance Co.*, 106 Mich. 96;

Boyd v. *Grove*, 89 Or. 80;

Doane v. *Garretson*, 24 Iowa 351;

Central Branch Union Pacific Railway Co. v. *Andrews*, 37 Kan. 162;

Greenfield First National Bank v. *Coffin*, 162 Mass. 180;

Conner v. *Levinson*, 115 Mich. 297;

Wyatt v. *Seaboard Air Line Railroad Co.*, 156 N. C. 307;

Galveston, etc., Railroad Co. v. *Jones*, 123 S. W. 737.

Appellant complains that if its lands are to be assessed upon an average basis as to time, it is unfair to cover only this twelve-year period, as appellant is thereby deprived of the benefit of an average based on lower values prior to the period mentioned in the complaint, or lower values caused by the cutting of timber in future years. Appellant has been given full benefit under its contention as to the cutting of timber, as all of the lands from which any substantial amount of timber has been cut have been relieved from the payment of any back taxes. As to the matter of lower values in prior years, it seems that counsel are inconsistent in contending they would derive any benefit by including former years, as none of the timber had been cut from the lands then, and they were more valuable then than later.

Counsel say that it seems rather strange that with the testimony varying at amounts from 20 to 33 1/3 per cent, the chancery court should adopt for all time the basis of 30 per cent, nearly the highest amount given, and the Supreme Court should affirm that basis. We submit this statement is not accurate. By the list of transfers filed by appellant itself many pieces of property are assessed at far above 30 per cent, and in the list filed by appellee a far greater number. A number of these transfers show assessments at from 50 to 100 per cent of the value of the property conveyed.

Appellant has filed an "appendix" to its brief, which contains a copy of a number of the statutes of Arkansas, and also what might seem to be a verbatim copy of the testimony. There are numerous omissions, however, some of which we have pointed out.

On page 99 of their brief, counsel mention three specific pieces of property showing assessments ranging from 8 to 16 per cent of the value. We feel that it would only lengthen our brief to specifically set out the numerous transfers in which assessments have been from 30 to even 100 per cent of the value of the property. They are all contained in the list of transfers hereinbefore referred to. Assessments below the average rate can, of course, always be found. However, all assessments, however high or low, have been considered in finding the average.

We respectfully submit that, regardless of what view this court may take of the method adopted by the State

court in arriving at the values and the average assessment of property for taxation, there has clearly been no violation of any provision of the Federal Constitution.

Counsel state the method adopted for assessing property in back-tax suits is different from that used in original assessments and is therefore discriminatory. In the case of *Winona & St. Peter Land Co.* v. *Minnesota, supra*, it was expressly held that the fact that there was "a different mode of assessment of property which has escaped taxation in prior years from the general mode of assessment of property, does not deprive the property owner of any constitutional right." We submit that authority is squarely in point.

While uniformity of taxation requires uniformity in the mode of assessment as well as in the rate of taxation, yet it has always been held that the uniformity thus required is uniformity in result and not actual uniformity in methods. The rule is stated in Cooley on Taxation (4 Ed.), Section 299, and the authorities collected therein. Appellant clearly has no complaint to make about the results of the use of this system in the present case.

If there can be any objection to the use of an average system in arriving at the basis of assessment in this case, we believe it operates against appellant rather than appellee. This court has always held there is no presumption of a violation of duty by the taxing authorities. In this case they are presumed to have assessed property at the legal rate of 50 per cent. The burden is therefore upon appellant to show that there has been an assessment of property generally at a lower percentage of its value. If no such showing has been made for any year in question, then that objection should be raised against appellant rather than against appellee, and the legal rate applied.

In conclusion, we submit that to grant appellant's request and allow the assessment of its lands to remain at $4 an acre would be a flagrant discrimination against the Long-Bell Lumber Company, whose lands have been assessed at $10 an acre. This assessment is covered by stipulation of counsel (R. 228). It was insisted in the State court that there was no testimony to show this to be timber land. F. E. Stephenson, the assessor, explicitly testified that this is timber land and mentioned the raise in its assessment from $6 to $10 an acre (R. 126). Although the

Long-Bell land is inferior to that of appellant, even that land is assessed more than twice as much per acre. This injustice would be in addition to the discrimination against the owners of cut over lands already referred to, and also against other property owners generally in the county.

Respectfully submitted,

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